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Supreme Court of the United States

No. 1195

October Term, 1941.

CITY OF SALAMANCA, HOME OWNERS LOAN CORPORATION, SALAMANCA TRUST COMPANY, SALAMANCA FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST NATIONAL BANK OF SALAMANCA, FRANK A. FORNESS and JESSIE FORNESS,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Petition for Writ of Certiorari.

The petitioners above named respectfully pray that a writ of certiorari be issued from the Supreme Court of the United States directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on

its docket, No. 113, October Term, 1941, United States of America, plaintiff-appellant v. Frank A. Forness and one, defendants-appellees, and certain others above named, intervenors-appellees, and that the decree of the Circuit Court of Appeals and the judgment of the District Court as decreed may be reversed, and that the petitioners may have such other and further relief as may be just and proper.

Opinions Below.

The opinion of the District Court (R. 312-327) is reported in 37 F. Supp. 337. The opinion of the Circuit Court of Appeals (R. 386-412) is reported in 125 F. (2nd) 928.

Jurisdiction.

The order and judgment of the Circuit Court of Appeals (R. 412) was entered on February 5, 1942. Judgment thereon by the District Court was filed and served about March 19, 1942. The jurisdiction of the Supreme Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28 §347).

Statutes Involved.

Three acts of Congress and an act of the New York Legislature are directly involved. All are printed in full in Appendix A to this brief. The acts of Congress are the Act of February 19, 1875, c. 90, 18 Stat. 330; that of September 30, 1890, c. 1132, 26 Stat. 558; and that of February 28, 1901, c. 622, 31 Stat. 819. The act of the New York Legislature, Ch. 188 of N. Y. Laws of 1881, variously recodified, once as Ch. 679 of N. Y. Laws of 1892, is now found in N. Y. Indian Law, §71.

Summary Statement of Matter Involved.

The pertinent facts involved as disclosed by the findings of the District Court based upon uncontradicted evidence are substantially as follows:

The City of Salamanca, having a population of about 10,000 persons, is in the southwestern part of New York State. It is unique among the cities of the United States in that it is located upon an Indian reservation. The title to substantially all lands within the City is by printed form leases, over two thousand in number, all of ninety-nine years duration from February 19, 1892, given by the Seneca Nation of Indians, as authorized by certain Acts of Congress, in consideration of an annual rental fixed by each lease. (Finding I, R. 329-331.)

The suit now involved was commenced in September 1939 by the United States of America on its own behalf and on behalf of the Seneca Nation for judgment that a certain lease be cancelled because of default in paying the rent, and that the Seneca Nation be given immediate possession of the leased lands. (Findings XV and XVI, R. 340; also R. 5-10.) These leased lands are a corner lot, approximately 47 feet by 162 feet, on the principal business street of Salamanca. A brick building costing upwards of $63,000 is located thereon. The original defendants, Mr. and Mrs. Forness, have occupied the premises for many years as their home and place of business. Salamanca Trust Company, which was permitted to intervene as a defendant, owns a mortgage on the premises given in 1934 for $15,000. (Findings VII and VIII, R. 335.)

The Indian lease of the premises provides for an annual rental of $4 until 1991, payable on each February 19th.

(Finding IV, R. 331-333.) The only specific provision for its enforcement, and the one upon which the suit was based (R. 141), is the following paragraph of the lease:

> "And it is further agreed that if the rent, or any part thereof hereby provided for, shall not be paid as herein provided, that the party of the first part may reenter the said premises, or resort to any lawful remedy. to remove all persons therefrom." (R. 333.)

One main question presented by the suit was, what remedies, controlled by what body of law, were made applicable by that language when it was agreed upon in 1892.

Assuming that this is a question of intent, not determined by a disability of the Indians arising from their status or special provisions of the acts authorizing them to lease, the relevant acts and statutes and other background material may help determine what the parties intended by the provision. The acts and statutes directly involved are printed in Appendix A to this petition and brief, and Appendix B cites and quotes certain other official documents and decisions illustrating the peculiar dual control by the State of New York and the United States over the Seneca Nation and its reservations which has existed for a century and a half.

Originally the rental was payable to the Treasurer of the Seneca Nation (R. 133, and §6 of Act of 1875), but an Act of 1901 provided that all such lease moneys should be payable to and recoverable by the United States Indian Agent. Each year for at least twenty-four years before the suit was commenced such Indian Agent sent to each lessee a printed form of notice that a specified amount was becoming due or was past due, including the following statement:

> "Rents are due each year in advance on February 19, and must be paid on or before April 20 thereafter, or interest will be charged from the time that the rent became due." (Finding X, R. 335-336.)

The Seneca Nation knew of and acquiesced in this form of notice (Finding XXI, R. 341), regarded the Indian Agent as having authority to extend the time of payment of the rentals (Finding XX, R. 341), his form of notice was approved by the Department of the Interior (Finding XVIII, R. 340) and his course justified a belief on the part of the lessees, upon which they relied, that the rents would be received although overdue. (Finding XVII, R. 340; Jury Verdict, R. 329.) Two former Indian Agents testified that for many years it had been the custom of that office to accept rentals, regardless of how long in arrears, charging interest at six per cent after two months. (R. 179-180, 194-195.)

Early in 1939 such a notice was sent by the Indian Agent to Mr. Forness claiming to be due rent for nine years, 1931 to 1940, in the amount of $36, besides $8.64 of interest. (Finding XI, R. 337.)

On March 4, 1939, the Council of the Seneca Nation adopted a resolution purporting to cancel all leases which were in default and instructing that steps be taken to recover the lands. (Finding XLV, R. 339.) That was on a Saturday. On the following Monday morning Mr. Forness paid the Indian Agent the sum of $44.64 claimed from him. (Findings XII and XIII, R. 338.) He testified that he had no notice of the resolution when he made the payment, but he had heard some talk that there was going to be some trouble if the rentals were not paid. (R. 198, 202-204.)

The suit now involved, based upon the provision of the lease previously quoted, was commenced about six months after the payment was made. There never was any demand for the rent such as would convey a warning that otherwise forfeiture would be claimed, and a return of the payment never was tendered.

The second main issue in the suit was whether, in the light of the foregoing circumstances and whatever body of law was applicable, a forfeiture was justified.

The Civil Practice Act of New York provides that a right of re-entry reserved in a lease as a remedy for non-payment of rent cannot be availed of without fifteen days notice, and even after judgment for the lessor the lessee has six months to pay the arrears and obtain restoration of the property. (Finding XXII, R. 341-343.) The defendants claimed, and claim now as petitioners, that the lease provisions for re-entry, particularly in the light of the acts and statutes expressly applicable to them and the practical construction they have received for fifty years, intend that re-entry be governed by State law. They also relied and now rely upon the effect of the payment before demand. under common law and equitable principles.

The district Court refused to find that the State law was applicable, but found that the United States and the Seneca Nation were estopped under common law and equitable principles from maintaining the suit, and gave judgment for the defendants. (R. 344-346.)

The United States appealed to the Circuit Court of Appeals, which reversed and directed judgment for the appellant. The Circuit Court of Appeals held that no State

law was applicable because Indians were involved and the United States had not given its consent that any State law should be applicable to them; that the Act of 1875 was not such a consent; apparently it held that any agreement that State laws be applicable which otherwise might be deduced from the lease provision was immaterial in the absence of such consent; that the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, did not make the State law applicable, the reason unstated but apparently because there was a body of Federal law applicable; that the Federal law applicable was the common law as affected by Congressional intent concerning the Senecas; and that this excluded any need for demand before suit. The Circuit Court of Appeals assumed, and so stated, that the title to these lands came from the United States (R. 390), which is not the fact. (See Appendix B.) It also held that there was no estoppel.

Thus far, dealing only with the pertinent facts directly involved as disclosed by the findings, there appears some of the significance of the judgment below, from the viewpoints of the petitioners Forness, Salamanca Trust Company and City of Salamanca. Because of what has been adjudged to be a default in the sum of $44.64, the petitioners Forness have forfeited a property which cost more than $63,000, the Trust Company has been deprived of its mortgage lien amounting to $15,000, and the City has been deprived of the right to tax the property by reason of its reverting to Indian ownership.*

The following facts, taken from the answers of the intervenors, show that the significance of the adjudication

* Thus far in this petition no notice is taken of the possibility of negotiating a new lease upon a higher rental. Whether such an offer appears to have been made, and what relief it offers, will be discussed in subsequent pages.

goes far beyond what is directly involved. That is not unusual, of course, but there is peculiar reason for it in the present case. It is not overstatement to say that the existence of the City of Salamanca, its three financial institutions, the loans of the H. O. L. C. and the whole business and financial structure of the City are involved.

It appears that the Salamanca Trust Company has other capital in jeopardy besides the Forness mortgage. It has $335,000 of its assets loaned upon 125 mortgages upon leased lands, and is the "owner", *i. e.* lessee, of 31 parcels. Tenders of lease money have been made and refused affecting 25 of the mortgaged properties. (R. 37-38.)

The Salamanca Federal Savings & Loan Association has loans now outstanding aggregating $217,770.10 upon 169 mortgages upon leased lands, and owns 4 parcels. Tenders have been made and refused as to 55 properties. The tenders amount to less than $800, but the mortgages endangered total about $55,000. (R. 96-98.)

The First National Bank of Salamanca owns 16 such mortgages aggregating $20,872.34. Tenders have been made and refused as to three properties. The lease money in default upon those three properties is $7.12, and the mortgages upon them amount to $3,200. (R. 56.)

The H. O. L. C. has outstanding $366,092.24 upon 164 such mortgages. Tenders have been made and refused affecting an unspecified number and amount of them. Mr. Thomas H. Dowd, attorney for H. O. L. C., referred in the course of an argument upon the trial to the method by which a lease forfeiture, such as has been adjudged in the Forness case, could be used by any lessee to defeat all

liens upon the mortgaged property, to the advantage of the lessee and the Seneca Nation. (R. 188-189.)

The City of Salamanca has acquired 279 parcels of leased lands by tax sales, and in addition owns various parcels occupied by fire stations and other municipal facilities. The existence of the City and continuance of its municipal services depend upon real property taxes derived from the leased lands within its borders. Indian rentals constitute a first lien upon the lands, prior even to the charge for governmental services. That is a sufficiently extraordinary situation. Much more disturbing is the situation which has been adjudged below, which is that the Indian rentals are not merely a prior lien, which can be assumed by the City and other subsequent lienors, but that it is a condition of forfeiture without warning which can defeat all tax liability, past and future. The City asserted in its answer that 367 tenders had recently been made and refused upon that many parcels of land, and that the state of law which has been adjudged would "unsettle titles in said city and prevent the loaning of money on any real estate therein," would "disturb the entire life of the community," and would "frustrate the city in its attempts to promote industries and prosperity within its borders." (R. 76-77.)*

Thus far this petition has dealt separately with facts found after admission or proof at the trial, and with facts merely alleged by the answers of the intervenors. The opinion of the Circuit Court of Appeals deals with some additional facts, and hence they must be noticed here.

* A recent act of the Legislature, ch. 231 of N. Y. laws of 1942, recognizes the gravity of this situation and offers some redress.

The plaintiff-appellant had printed at pages 230-283 of the record before the Circuit Court of Appeals its motion for summary judgment and some affidavits and other papers brought together to support it. Those papers were served on the attorney for Mr. and Mrs. Forness the day before the trial was had, and at the commencement of the trial, when the United States attempted to obtain a ruling upon its motion for summary judgment, the District Court denied it, not upon the merits but because it was unseasonable. (R. 137; also R. 377.) Those affidavits and other papers were incomplete when they were served upon Mr. Congdon, they were never served upon the three attorneys for the other defendants or their trial counsel, they were never answered, they were not submitted to the District Judge until after his decision seven months later, there was no oral argument of the motion and it and the facts shown by the papers were not mentioned in the briefs for directed verdict and dismissal or in the opinion of the District Court or in its findings. "No part of these affidavits were ever submitted to the court or ever seen by this [District] court until after the record on appeal had been printed." (R. 377-381.)

The District Court, upon motion of the defendants under Rule 75-h of the Rules of Civil Procedure to correct the record, granted the motion to strike out from the record on appeal the affidavits and other papers aforesaid. (R. 370-385.)

The Circuit Court of Appeals has determined that this correction was not within the power of the District Court (footnote 3, R. 389) but it has not permitted the affidavits to be answered or the motion to strike out to be renewed. The Circuit Court of Appeals has availed itself of the un-

served, unanswered and unadjudicated affidavits, and its decision is largely based thereon.

The important allegation obtained from that source, as summarized in the opinion of the Circuit Court of Appeals, is that the Seneca Nation, "coupled with their cancellation of the leases an offer to re-rent the affected plots on generous terms (at an annual rental of 2½% of the appraised value of the property, less the value of the improvements.) Thus computed, the annual rent on appellee's plot will be $115. Any such lease was to be subjected to all encumbrances which had attached to the cancelled lease." (R. 388-389.) In a subsequent part of the opinion that matter is referred to again, as "decisive" against the argument made by appellees that their property was being subjected to a forfeiture. (R. 408.)

Relying upon the disputed affidavits, it seems that when the Seneca Nation adopted a resolution on March 4, 1939, purporting to cancel all delinquent leases (R. 233-234) it also adopted a resolution that in all cases of terminated leases the premises could be leased thereafter at an annual rental "not less than" 2½% of the assessed valuation. There was no suggestion as to who should have the first or other privilege to lease, no continuance of the encumbrances, no exclusion of improvements from the assessed valuation, and no suggestion as to terms of the new leases, except a new provision that the new leases be automatically terminated by six months delinquency in rent after notice. (R. 235.)

On June 15, 1940, more than fifteen months after the resolution of cancellation and the payment by Forness, long after the suit was commenced and at issue and shortly

before trial, in the course of which neither re-renting proposal was mentioned, the Seneca Nation adopted a resolution for a more specific proposal. (R. 237-248.) Probably this is the one which was "decisive" with the Circuit Court of Appeals, but it was not "coupled with their cancellation of the leases" except by reference in its recitals, and it contained some important provisions not noticed in the Court's summary, notably that all timber and all gas, oil and other mineral rights are to be reserved to the Seneca Nation and may be removed by it at any time, and that rental is to be adjusted each ten years by a board of three, the Seneca Nation and the City each naming one and if they do not agree the third to be named by the Indian Agent.

Questions Presented.

A.

Whether the United States has consented, by the Act of February 19, 1875, or by an entire course of legislation and administration of which that is a part, to the extension of New York State laws over the reservations of the Seneca Nation to the extent that the provisions of State law are applicable to interpretation and enforcement of the re-entry provision of the lease involved herein.

B.

Whether Chapter 188 of the N. Y. Laws of 1881, now found in Section 71 of the Indian Law of that State, which expressly declares that all the general laws of the State are extended over and apply to those parts of the Allegany reservation involved herein, is, by reason of lack

of consent by the United States, violative of Article I Section 8 Subsection 3 of the Constitution of the United States.

C.

Whether the re-entry provision of the lease involved herein could, consistently with the powers and disabilities of the Seneca Nation in 1892, and does, express an intent that the laws of New York State be applicable for enforcement of the lease.

D.

Whether the courts below should, for any reason, have applied the laws of New York State to adjudication of the issues herein.

E.

Whether this suit to cancel the lease because of default in paying the rent and to repossess the leased land on behalf of the Seneca Nation can be maintained in the name of the United States, without demand having first been made in such form as would have given notice that non-payment might result in suit for cancellation and repossession.

F.

Whether this suit can be maintained in view of the equities on behalf of the petitioners arising from the long-continued course of the Indian Agent and his predecessors, with the knowledge and acquiescence of the Seneca Nation, in giving notices in such form and accepting arrears

of rent money in such manner, as would and did lead petitioners to suppose that the only penalty for failure to make timely payment of rent money was liability to pay interest upon the arrears.

G.

Whether this suit can be maintained after payment of the rent money and interest and without tendering its return to the petitioners Forness.

H.

Whether the proposal for a re-rental was before the Circuit Court of Appeals in such form that it could properly base its adjudication upon it.

I.

Whether the proposal for a re-rental is sufficiently consistent with the Act of February 19, 1875, as amended, and sufficiently favorable to the petitioners, to overcome equities which might otherwise exist in their favor and be decisive against a forfeiture.

Reasons Relied on for Allowance of the Writ.

A.

The Act of 1875 in its Sec. 8 contains a provision that "all municipal laws and regulations of said State may extend over and be in force within said villages", etc. The Circuit Court considered this provision alone and decided that "municipal" should be read in its more restricted

sense. (R. 390-391.) Petitioners urge that when the Act of 1875 is read as a whole a broader intent is apparent. They also urge that this intent is even clearer when the language of the act is considered as part of an entire course of legislation and administration, illustrated by the material found in Appendix B of this petition, whereby the United States has recognized for a century or more the propriety of a limited jurisdiction by New York over the reservations involved.

B.

Ch. 188 of N. Y. Laws of 1881, and its present form in N. Y. Indian Laws §71, expressly provides that "all the general laws of the state" are extended over the parts of the Allegany reservation included in Salamanca and the other villages created under the Act of 1875. The argument based on this statute was urged in the District Court, which decided against it (R. 318-321, the statute being referred to there as Ch. 679 of N. Y. Laws of 1892), and it was urged again by the brief of the appellees in the Circuit Court. It was not noticed in the Circuit Court opinion. Probably the statement of that opinion that "state law does not apply to the Indians except so far as the United States has given its consent" (R. 390), was thought to dispose of Ch. 188 of N. Y. Laws of 1881 as well as the N. Y. Civil Practice Act. There can be no doubt about the legislative intent expressed in the 1881 statute. The Circuit Court has held, without express reference but by implication, that the statute violates Article I Section 8 Subsection 3 of the Constitution of the United States.

This decision is erroneous, in the light of *New York v. Dibble,* 62 U. S. 366, 370, and *U. S. ex rel. Kennedy v.*

Tyler, 269 U. S. 13, 16-17. Both decisions, one in 1858 and the other in 1925, relate to the jurisdiction of New York to extend its laws over the Seneca reservations as to matters of general law and order wherein Congress did not expressly authorize or prohibit. In the former case this Court said:

> "Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered."

And again in the 1925 case this Court said:

> "It is enough for present purposes to say that the State of New York, as early as 1849, at the request of the Indians, assumed governmental control of them and their property, passed laws creating and defining the jurisdiction of the peacemaker's courts, administered those laws through its courts, and that Congress has never undertaken to interfere with this situation or to assume control."

The decision of the Circuit Court that the statute of the State enacted in 1881 violates the Federal Constitution may be ground for appeal or writ of error under Section 240 (b) of the Judicial Code as amended, but that seems an uncertain position in view of the fact that the decision was by implication; moreover, it is undesirable that this review be limited to the single question.

C.

The re-entry provision of the lease involved herein, made in 1892 by authority of the Acts of 1875 and 1890, expresses

an intent that the laws of New York be applicable for enforcement of the lease. When Congress validated and authorized renewal of leases previously made under supposed authority of State law, and opened both State and Federal courts to litigation arising, it must have authorized and intended this result. The language used in the lease of 1892, that if the rent was unpaid the Seneca Nation might, "re-enter the said premises, or resort to any legal remedy, to remove all persons therefrom", was appropriately chosen, having a well-established meaning under New York law of that time, to save to the landlord both the remedies of ejectment and summary proceedings. See *Michaels v. Fishel,* 169 N. Y. 381, 388-390; *Baylies v. Ingram,* 84 App. Div. 360, 264-365, affd. 181 N. Y. 518 mem.; *Van Rensselaer v. Snyder,* 13 N. Y. 299; and see a contemporaneous lease form at page 622 of "*A Treatise on the Law of Real Property*", etc., by John Willard, formerly Justice of the Supreme Court, published at Albany in 1869 and 1885. It follows that the Circuit Court erred in holding the provisions of the N. Y. Civil Practice Act, which were existent long before 1875, inapplicable to an action for enforcement of the re-entry clause of the lease.

D.

The Circuit Court held that *Erie R. Co. v. Tompkins,* 304 U. S. 64, was inapplicable (R. 391, 401) but it did not say why. That decision interpreted the Federal Judiciary Act of 1789, c. 20, 28 U. S. C. A. §725, which provides:

> "The laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The subject matter for decision here is rights arising under a lease, originally made under the supposed authority of State law and subsequently renewed under authority given by an Act of Congress. It would seem that the doctrine of *Erie R. Co. v. Tompkins* is applicable. Compare, *Bd. of Comrs. v. United States,* 308 U. S. 343.

E.

The question whether this suit to cancel the lease because of default in paying the rent and to repossess the leased land on behalf of the Seneca Nation can be maintained by the United States, without demand having first been made in such form as would have given notice that non-payment might result in suit for cancellation and repossession, subdivides into several questions. In the first place, the United States can show no clear authorization for itself alone to be plaintiff to enforce this lease made by the Seneca Nation. Secondly, the law of demand is not obsolete learning, no matter how earnestly the Circuit Court may deprecate it. See, *Henderson v. Carbondale Coal and Coke Co.,* 140 U. S. 25; *Lamson Consol. Store Service Co. v. Bowland,* 114 Fed. 639; *Johnson v. Lehigh Valley Traction Co.,* 130 Fed. 392. Thirdly, the inequity of permitting a forfeiture without some demand which would convey a warning, after a long course of dealing tending to the contrary, is clear upon general principles of fair dealing.

F.

The facts as to the continued course of the Indian Agent and his predecessors, with the knowledge and acquiescence of the Seneca Nation, in giving notices to pay rent in such

form and accepting arrears of rent money in such manner as would and did lead petitioners to suppose that the only penalty for failure to make timely payment of rent money was liability to pay interest upon the arrears, were stated earlier in this petition.

It is the law of New York, and probably it is universal law, that if parties to a lease permit a custom to grow up for payment in a different manner than provided in the lease, no sudden return to the terms of the lease to claim a forfeiture will be upheld by the courts. *Horton v. N. Y. C. etc. Co.*, 12 Abb. N. C. 30, affd. 102 N. Y. 697 mem.; *Montant v. Moore*, 135 App. Div. 334; *Palmer etc. Co. v. Barney Est. Co.*, 149 App. Div. 136.

Various countervailing reasons, including the assumption that the $4 rental fixed in 1892 or earlier, concerning which no facts have been offered, was unconscionably low, are suggested by the Circuit Court. (R. 406-409.) It is submitted that an important judgment should not be based upon supposed equities which were not litigated or even suggested in the District Court, and that the District Court judgment, based upon the equitable issues which were litigated, should have been undisturbed.

G.

The petitioners Forness paid the rent money and interest to the Indian Agent. It has never been tendered back, but proceedings have been conducted as though it was never paid. This plain state of facts is not answered by doubts as to the authority of the Indian Agent to act for the Seneca Nation. (R. 391-392.) The fact is that he did so act, by authority of Congress, with the knowledge and

acquiescence of the Indians, in the present case and for many years before.

H.

The proposal for a re-rental was before the Circuit Court only through an offer by the appellant upon the oral argument (R. 408), and by some affidavits very dubiously in the case. (R. 389.) Without waiving the points that the affidavits were never properly served and that the District Court properly struck them from the record, it is at least clear that no opportunity was ever afforded to answer these affidavits, that they were never brought to the attention of the District Court until it had lost jurisdiction for all purposes unless to correct the record, and that the District Court never considered them for any other purpose. To seize upon them as "decisive" for purposes of the Circuit Court's judgment, under those circumstances, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. (Rule 36, 5, (b) of the Revised Rules of this Court.)

I.

The Act of 1890, amending the Act of 1875, provides that whenever a lease is renewable by terms of the former act it shall be renewable for a term not exceeding ninety-nine years. Looking at the 1875 act, it is clear that renewal of a lease of the same lands covered by his former lease is a right reserved to the owner of improvements erected upon the lands, except that certain "conditions" and the "amount of annual rents" shall be agreed upon between the lessee and the Seneca Nation acting through its councillors. If they cannot reach an agreement each shall

name a referee, and if the two referees fail to agree they shall choose a third person. Under the Acts of Congress, in the very probable event that the arbitration procedure does not arrive at new "conditions" and fix a new rental, apparently the lessee is entitled to continue in possession under the terms of his expired lease.

The new lease, made available to Forness just before going to trial in this suit, seems to depart from the statutory authority in several important particulars. One difference is that it attempts to name the third referee through the Indian Agent, a significant improvement, from the viewpoint of the Department of the Interior and probably from that of the Indians, upon the handiwork of Congress. The second is that the new lease binds Forness to a lease for a longer term than it fixes the amount of annual rents; it merely provides a formula to measure the future rent, and it is not clear whether the value of improvements is excluded after the first ten years. A third important difference is that the new lease will not cover the same lands and interests in them as the previous lease; it reserves to the Seneca Nation the right to cut down Forness's shade trees, if any, drill for gas and oil upon the premises, and enter from time to time to evaluate the reserved rights.

Whether the Circuit Court noted these departures from the authority given by Congress does not appear. Its opinion says nothing about them. Its conclusion that the proposal for re-rental was sufficiently favorable to the petitioners to overcome equities which might otherwise exist in their favor and be decisive against a forfeiture, seems to have been made without a two-sided presentation either of fact or law, and is erroneous.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari in the instant case should be granted.

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Appendix A.

Act of February 19, 1875, c. 90, 18 Stat. 330:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all leases of land within the Cattaragus and Allegany reservations in the State of New York, heretofore made by or with the authority of the Seneca Nation of New York Indians, to railroad-corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws and form of government, lease lands within said reservations for railroad-purposes.

SEC. 2. That the President of the United States shall appoint three commissioners, whose duty it shall be, as soon as may be, to survey, locate, and establish proper boundaries and limits of the villages of Vandalia, Carrolton, Great Valley, Salamanca, West Salamanca, and Red House, within said Allegany reservation, including therein, as far as practicable, all lands now occupied by white settlers and such other lands as, in their opinion, may be reasonably required for the purposes of such villages; and they shall cause a return of their doings in writing, together with maps of such surveys and locations duly certified by them, to be filed in the office of the county clerk of the county of Cattaraugus, in said State, there to be recorded and preserved. The boundaries of said villages so surveyed, located, and established shall be the limits of said villages for all the purposes of this act.

SEC. 3. That all leases of land situate within the limits of said villages when established as hereinbefore provided, except those provided for in the second section of this act, in which Indians or said Seneca Nation, or persons claiming under them are lessors, shall be valid and binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of such period, or at the expiration of such leases as terminate within that time, said nation through its councillors shall be entitled to the possession of the

said lands, and shall have the power to lease the same. *Provided, however,* That at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding twelve years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in possession of such lands, on such conditions as may be agreed upon by him or them and such councillors; and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said councillors shall appoint one person, and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and the person or persons owning said improvements shall be entitled to a lease of said land and to occupy and improve the same according to the terms of said award, he or they paying rent and otherwise complying with the said lease or said award; and whenever any lease shall expire after its renewal as aforesaid, it may, at the option of the lessee, his heirs, or assigns, be renewed in the manner hereinbefore provided.

SEC. 4. That said Seneca Nation is hereby authorized, by resolution of its councillors, duly elected according to the laws and system of government of said nation, or in such other manner as said nation in council may determine, to lease lands within said villages to which, by the laws or customs of said nation, no individual Indian or Indians, or other person claiming under him or them, has or is entitled to the rightful possession.

SEC. 5. That it shall be the further duty of the said commissioners to cause all lands within such villages now leased, as hereinbefore mentioned, to be surveyed and defined as near as may be, and to cause the same to be designated upon the maps of such villages hereinbefore mentioned and provided for. All leases of

lands within said villages, whether now existing or hereafter to be made under the provisions of this act, shall be recorded in the office of the clerk of said county of Cattaraugus in the same manner and with like effect as similar instruments relating to lands lying in said county outside of said reservations are recorded by the laws of said State of New York. All leases herein mentioned or provided for shall pass by assignment in writing, will, descent, or otherwise in the manner provided by the laws of said State: *Provided, however,* That the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions.

SEC. 8. That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless,* That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

Act of September 30, 1890, c. 1132, 26 Stat. 558:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the leases of land situate within the limits of the villages mentioned in the act of Congress entitled "An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases," approved February nineteenth, eighteen hundred and seventy-five, except leases to railroads, shall by the terms of said act be renewable, the same shall be renewable for a term not exceeding ninety-nine years, instead of the term of twelve years, as therein provided, subject to all other terms and conditions of said act.

Act of February 28, 1901, c. 622, 31 Stat. 819:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys which shall belong to the Seneca Nation of New York Indians arising from existing leases or leases that may hereafter be made of lands within the Cattaraugus, Allegany, and Oil Springs reservations, shall be paid to and be recoverable to the United States Indian agent for the New York Indian Agency for and in the name of the said Seneca Nation: *Provided,* That nothing herein contained shall be held to validate or confirm any lease that otherwise may be invalid.

SEC. 2. That from the moneys so received from said leases the said agent shall annually, on the first Wednesday after the first Tuesday in June, pay over to the treasurer of the Seneca Nation the sum of two thousand five hundred dollars for the disposal by its council, and shall distribute the balance of said moneys, after deducting as hereinafter provided, among the heads of families of the Seneca Nation in like manner and under the same conditions that the annuities paid to the said nation by the United States are distributed.

SEC. 3. That the said agent shall give bond to the United States in such sum as may be approved by the Secretary of the Interior, and he shall make an annual report to the Commissioner of Indian Affairs of the

receipt and disbursement of all moneys arising from said leases, and he shall receive annually, as additional compensation, the sum of two hundred and fifty dollars.

SEC. 4. That the treasurer of the Seneca Nation shall annually, on the last Tuesday in April, make a written report to the United States Indian agent of the New York Indian Agency of all moneys received and disbursed by him as treasurer of said Seneca Nation.

SEC. 5. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.

LAWS OF NEW YORK.

CHAP. 188.

AN ACT extending the general laws of the State of New York over lands included in the villages surveyed, located and established on the Allegany Indian Reservation, by United States Commissioners appointed for that purpose, constituting the estate therein when held under lease from the Seneca Nation of Indians, a freehold estate; ratifying and confirming the acts of town, village and school officers concerning such lands and the residents thereof.

PASSED May 2, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All those parts of the Allegany Indian Reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed, located and established by John Manley, Joseph Scattergood and Henry Shanklin, commissioners appointed by the president of the United States for that purpose pursuant to an act of congress approved February nineteenth, eighteen hundred and seventy-five, are constituted parts of the several towns within which they are located, and all the general laws

of this state are extended over and shall apply to the same. Provided always, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

§ 2. All acts of commissioners of highways or other town officers of the towns in which said villages are located, concerning the lands or roads therein, all proceedings incorporating villages on said lands, or of the officers of such villages concerning the same, or under such acts of incorporation; all proceedings forming school districts within such villages, and all acts or proceedings of school officers in such districts heretofore done or performed which would have been legal if such villages or the land included therein had not constituted a part of said reservation, are hereby ratified, legalized and confirmed.

§ 3. Land situate in said villages, held by or under lease from the Seneca Nation of Indians and which the holders are entitled to have renewed at the expiration thereof by virtue of said act of congress are and shall be for all purposes considered a freehold estate and the owners of such leases freeholders, and the right of dower and tenant by curtesy shall attach thereto, and shall upon the death of any person owning the same without having devised it, descend in the same manner as a freehold of inheritance and shall for that purpose be treated as real estate. Provided, however, that the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

Appendix B.

Commencing with the original Constitution of 1777, and until 1938, the State Constitution continuously provided:

> "No purchase or contract for the sale of lands in this State, made since the fourteenth day of October, one thousand seven hundred and seventy-five; or which may hereafter be made of, or with the Indians, shall be valid unless made with the authority and with the consent of the Legislature."

Constitution of the United States, adopted in 1789, Art. I, § 8 (3):

> "The Congress shall have power * * *to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Indian non-intercourse act, adopted by Congress in 1802 (2 Stat. 145 § 19):

> "And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states * * *."

N. Y. Laws of 1822, ch. 204:

> "The sole and exclusive jurisdiction, of trying and punishing all and every person, of whatsoever nation or tribe, for crimes and offenses committed within any part of this state, except only such crimes and offenses as are or may be cognizable in courts deriving jurisdiction under the constitution and laws of the United States, of right belongs to, and is exclusively vested in the courts of justice of this state, organized under the constitution and laws thereof."

Report of House Committee on Indian Affairs in 1830 (21st Cong. 1st Sess., House Doc. No. 227), speaking of the law quoted above:

> "The law declaring the jurisdiction of that State, has been enacted several years, and the committee do not find that its validity has ever been seriously questioned."

President JACKSON, in his Second Annual Message, 1830 (Messages of Presidents, Richardson, Vol. II, page 522):

> "No act of the General Government has ever been deemed necessary to give the States jurisdiction over the persons of the Indians. That they possess by virtue of their sovereign power within their own limits in as full a manner before as after the purchase of the

Indian lands; nor can this government add to or diminish it."

President JACKSON, in a message to the Senate dated February 22, 1831 (Ibid., page 539):

"In the State of New York, where several tribes have resided it has been the policy of the Government to avoid entering into quasi treaty engagements with them, barely appointing commissioners occasionally on the part of the United States to facilitate the objects of the State in its negotiations with them."

N. Y. Laws of 1849, ch. 378:

"All the powers and duties which by any law of this state are granted to or charged upon the chiefs of the Seneca Nation of Indians, residing on the Cattaraugus and Allegany reservationss in this state, are hereby transferred and granted to and charged upon the president and councillors of the Seneca Nation of Indians, holding or who shall hold office under the constitution of said nation, of the fourth day of December last, and all powers and duties granted to or charged upon said chiefs in council by the laws of this State, are hereby transferred and granted to and charged upon such president and councillors in council assembled."

The Supreme Court, in 1858, in case of *State of New York v. Dibble*, 62 U. S. 366, 370:

"Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered."

A resolution of the N. Y. Legislature in 1871 (Assembly Journal, pages 122-123) provided:

"Whereas, a portion of the Allegany reservation, occupied by the Seneca Nation of Indians, has become popu-

lated by the white people; and, whereas, they have been induced to make settlements thereon (especially in the Town of Salamanca), on account of the natural business location of the place, and a ratification by the Legislature of the State of New York of leases made by them with the Seneca Nation of Indians; and, whereas, the sale of this reservation was recommended by the Indian Agent in 1868; and, whereas, it has become a matter of importance to the white settlers who have made improvements and invested their means in business pursuits thereon; therefore,

"Resolved, if the Senate concur, That the Senators from this State in Congress be instructed, and the Representatives be requested to procure the passage of same act, or the formation of a treaty with the Seneca Nation of Indians, whereby title may be obtained to the whole, or a portion of the Allegany reservation, or such relief secured for white settlers as the circumstances demand."

The appellant's brief in *Ryan v. Knorr* (19 Hun 540, decided by the Supreme Court of N. Y., 4th Dept., 1880), which relied upon the Act of Congress of 1875, made it an appendix to the brief, and said:

"This court took judicial notice in Nelson v. Down, decided at Special Term, May, 1874, by Mr. Justice Barker (not reported) that a considerable community had located upon and were doing business on that part of the Reservation now included in the villages of Great Valley and Salamanca, who had been induced to make homes on those lands in view of advantages derived from railroad connections made at that point. That the action of the Legislative department of this State had been with the view of making the title and possession of the citizens valid, without intention to disturb and wrong the Indians or place the State in hostility to the Laws, Treaties and Government of the U. S.

'State action alone cannot accomplish the result so much desired, that is, that a portion of the lands be alienable and the subject of lawful traffic. One of the natural channels of trade and railroad transportation through the State is over these lands, and for the purpose of favoring and facilitating the same,

> the State should, through its executive offices, take appropriate steps to secure the aid and co-operation of the United States in extinguishing, at an early day, the Indian title, and opening up a portion of this Reservation to the public. Barker, Justice.'
>
> "This court may well assume that the Act of Congress, following so soon after the decision of Mr. Justice Barker, was intended to remedy the evil pointed out by him, and that Congress intended to make the 'title and possession' of these inhabitants valid."

Other contemporaneous sources upon the Acts of 1875 and 1890 are: 1872 Report, Cmr. Ind. Aff. pages 200-201; Cong. Globe, Feb. 24, 1873, page 1666; Cong. Rec., May 4, 1874, page 3581; H. R. No. 478, 43rd Cong., 1st Sess.; S. Misc. Doc. No. 122, same session; 1874 Report, Comr. Ind. Aff., pages 23-24, 183-184; N. Y. Assembly Doc. No. 30 of 1875; House Misc. Doc. No. 75, 43rd Cong., 2nd Sess.; Cong. Rec., Feb. 2, 1875, pages 908-921; also Feb. 16, 1875, page 1321; 1877 Report, Comr. Ind. Aff., page 164; also 1880 Report, page 136; H. R. No. 2344, 49th Cong., 1st Sess.; S. Report No. 1680, 51st Cong., 1st Sess.; 1891 Report, Bd. Ind. Comrs., pages 18-25; 1892 Report, Comr. Ind. Aff., pages 338-347.

Mr. John R. T. Reeves, reporting to the Commissioner of Indian Affairs in 1914 (63rd Cong., 3rd Sess., House Doc. No. 1590, page 14):

> "Conditions on the remaining reservations show a crying need for reform. Naturally one casts about for the reasons why these conditions should have so long been permitted to continue. First among these we find the question of jurisdiction over these Indians, State and Federal. Much needless confusion exists, a pretty general impression prevailing that the State has exclusive jurisdiction. This seems to have arisen from two causes, first, because New York was one of the Thirteen Original Colonies and the title to the lands involved never was in the Fed-

eral Government, and secondly, because the State has exercised jurisdiction, while the Federal Government, to a large extent, has not. * * *. In brief, the principle involved may be broadly stated, that all State laws beneficial to Indians will be upheld, while those of a detrimental nature will be scrutinized with greater care."

HON. CUTHBERT W. POUND, associate judge of N. Y. Court of Appeals, in an article in 22 Columbia Law Review (1922), pages 101-102:

"Conflicting protectorates thus contend with the Indian nations themselves for supremacy. * * * The present confusion and uncertainty discredits the law suit between individuals as a means of deciding great questions of state and national jurisdiction. Many cases in the lower state and federal courts remain unappealed to the United States Supreme Court. * * * The nation owes a duty to its wards if it continues to treat the New York Indians as such, either to enact a code of civil and criminal law for the Indian reservations, or to subject them to state law, or to put an end to the tribal relations and leave the state supreme over the individual Indians as it alone has power to do."

The Supreme Court, in 1925, in case of *U. S. ex rel. Kennedy v. Tyler*, 269 U. S. 13, 16-17:

"It is enough for present purposes to say that the State of New York, as early as 1849, at the request of the Indians, assumed governmental control of them and their property, passed laws creating and defining the jurisdiction of the peacemaker's courts, administered those laws through its courts, and that Congress has never undertaken to interfere with this situation or to assume control."

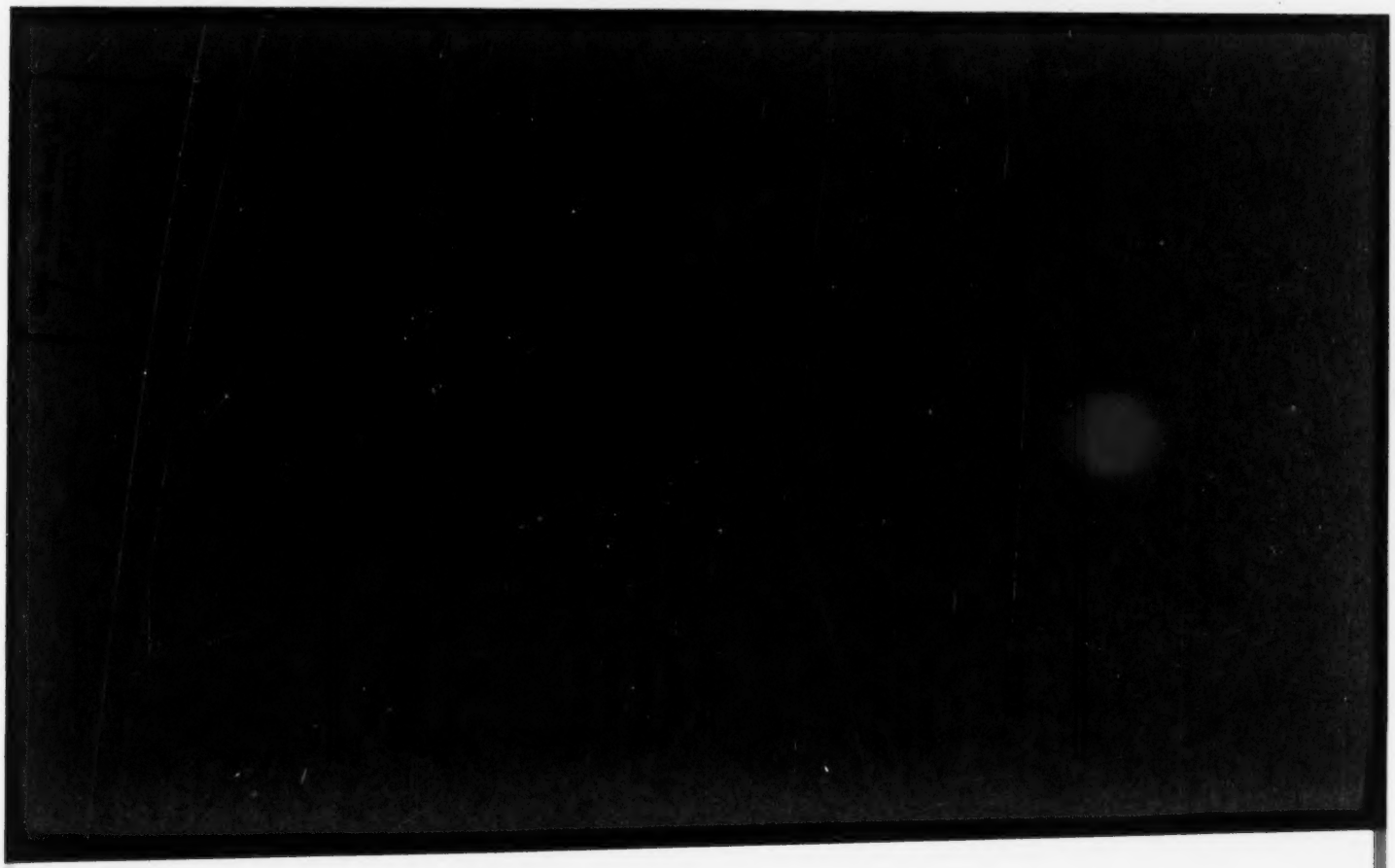
Secretary of the Interior, RAY LYMAN WILBUR, in a letter to Senate Committee on Indian Affairs, appearing in U. S. Daily of October 18, 1929:

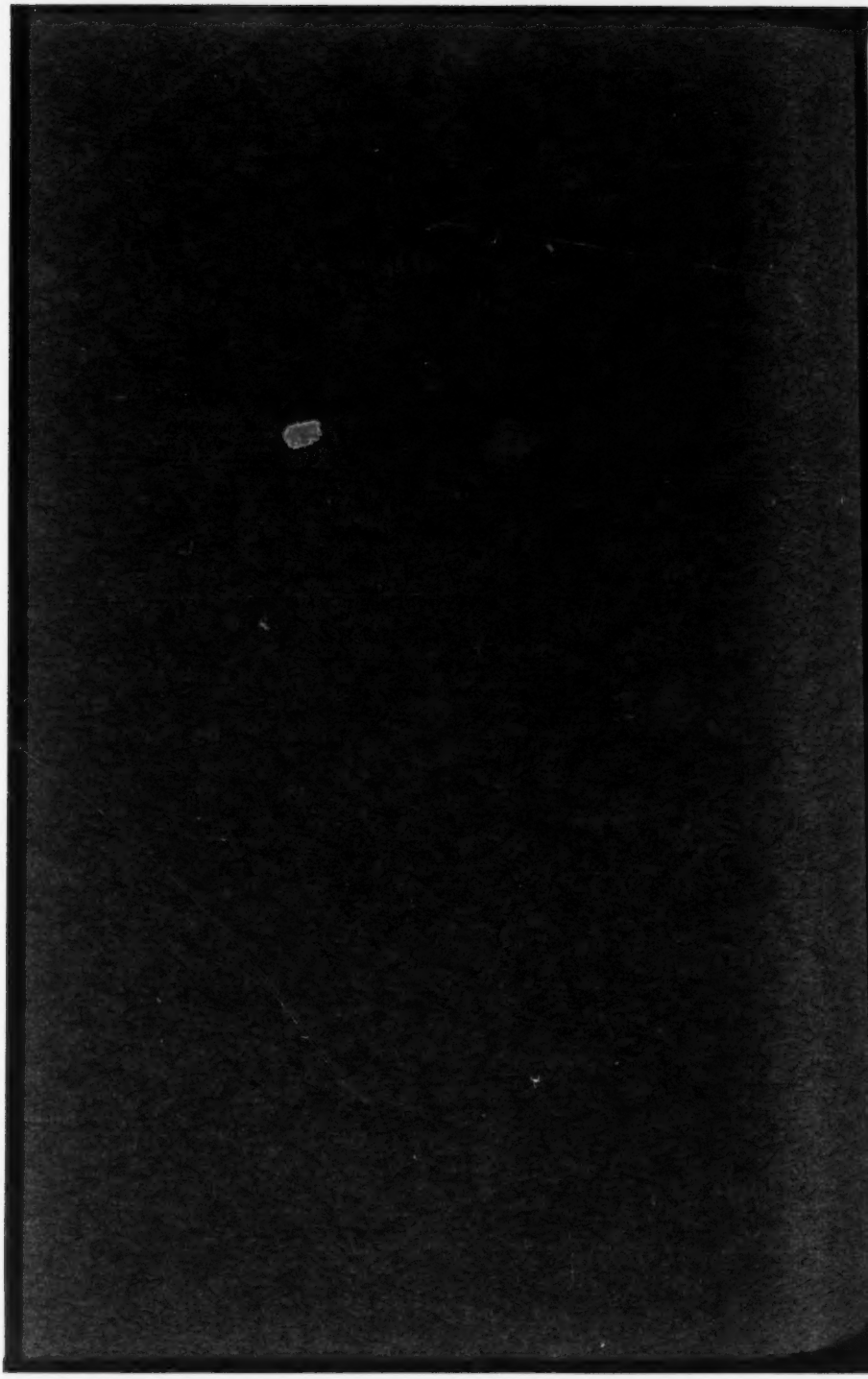
"The situation with respect to the Indians in the State of New York is somewhat peculiar. * * * the

State of New York has dealt directly with these Indian tribes claiming lands within her borders * * * no protest or opposition thereto has ever been raised, at least in so far as the legislative and executive branches of the Federal Government are concerned.

The State of New York has always assumed the burden of establishing and maintaining schools for the education of the Indian youth within her borders; has constructed improved highways through the reservations there and to some extent at least has enforced sanitation, health and other public measures of this kind among these people; all without expense to the Federal Government. In short, the State has heretofore exercised the usual prerogatives of sovereignty and jurisdiction over these Indians, while the Federal Government to a large extent has not. * * * This Department has not felt empowered to assume active control of the situation there, such as is now exercised over most of the other Indians of the United States. * * *

Congress undoubtedly has ample power and jurisdiction over the Indians in New York to enact such legislation as may be deemed necessary in connection with their affairs. Whether that should be by way of increasing Federal activities in their behalf or by strengthening the authority and prerogative of the State in the matter, should be seriously considered. In view of the fact that the State has heretofore always assumed the right to exercise sovereignty and jurisdiction over these people, I am strongly moved to recommend that the activities of the State in this respect be in no manner curtailed."





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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1195

CITY OF SALAMANCA, HOME OWNERS' LOAN CORPORATION, SALAMANCA TRUST COMPANY, SALAMANCA FEDERAL SAVINGS AND LOAN ASSOCIATION, FIRST NATIONAL BANK OF SALAMANCA, FRANK A. FORNESS AND JESSIE FORNESS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 312–327) is reported in 37 F. Supp. 337, *sub nom. United States* v. *Forness.* A subsequent opinion of the district court (R. 374–380) written after the appeal was taken is not reported. The opinion of the circuit court of appeals (R. 386–412) is reported at 125 F. (2d) 928, *sub nom. United States* v. *Forness.*

JURISDICTION

The judgment of the circuit court of appeals was entered February 5, 1942 (R. 412). The petition for a writ of certiorari was filed April 29, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the New York Civil Practice Act is controlling in a suit brought by the United States to enforce a lease made by the Seneca Indian Nation.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix A, *infra*, pp. 11–18.

STATEMENT

The judgment sought to be reviewed (R. 412) reversed a judgment (R. 345–347) dismissing the Government's complaint in a suit brought on behalf of the Seneca Nation of Indians, lessor, to cancel a lease upon lands in the City of Salamanca, New York. The material facts may be summarized as follows:

The City of Salamanca is located upon the Allegany Reservation of the Seneca Nation (R. 258–260, 329–331). Commencing about 1850, railroad companies and settlers obtained from the Senecas leases of real estate in that city (R. 261–263, 329–331). After the state court held that the leases

were invalid [1] notwithstanding the attempt of the New York legislature to ratify them, Congress, by the Act of February 19, 1875, c. 90, 18 Stat. 330, ratified the leases and, in addition, authorized their renewal for a term of twelve years. By Act of September 30, 1890, c. 1132, 26 Stat. 558, the permissible term was extended to 99 years and in 1892 several hundred leases were renewed for that period. Among them was the lease involved in this case. It stipulated an annual rent of $4.00 payable in advance on February 19 and reserved to the Nation the right to cancel the lease in case of a default in the payment of rent (R. 331–333). In 1919, the lease was assigned to petitioners Frank and Jessie Forness, hereafter called Forness. They erected a building on the property and, in 1934, mortgaged it to the Salamanca Trust Company (R. 334–335).

The United States Indian Agent for the New York Agency, to whom the duty of collecting the rents had been delegated by the Act of February 28, 1901, c. 622, 31 Stat. 819, has always had difficulty in making collections; for example, 1,095 leases were in default in 1911 and 529 leases in 1931 (R. 265–269, 273–280). In 1914 the agent then in office designed a form of notice to be used

[1] The opinion of the New York Supreme Court so holding is unreported. Its effect is set forth in House Misc. Doc. No. 75, 43d Cong., 2d sess. (1875), Appendix B, *infra*, p. 19. See also Act of June 30, 1834, c. 161, sec. 12, 4 Stat. 730, 25 U. S. C., sec. 177, prohibiting the leasing of Indian land.

in billing lessees; the notice stated that interest would be charged on unpaid rents but that no charge would be made if the rents were paid by April 20—two months after they became due (R. 335–337). Until 1939 bills in this form were regularly sent to all lessees (R. 335). Among them was Forness, who had paid no rent after April 11, 1930 (R. 143–145). In 1939 he received an annual notice showing that rent payments amounting to $36.00 and interest of $8.64 would be due on February 19, 1939 (R. 337–338).

On March 4, 1939, the Council of the Seneca Nation passed a resolution cancelling all leases then in default (R. 339). On March 6, 1939, Forness, having learned of this resolution, paid $44.64 to the Indian Agent and the money is being held by the Government pending the outcome of this suit (R. 392). At the same time that it cancelled the leases, the Council also authorized the releasing of the lands covered by cancelled leases for an annual rent of not less than 2½ percent of the assessed value of the land, excluding improvements. In the case of Forness, the new rental would amount to $115 a year (R. 235, 239). A leasing committee unsuccessfully sought to negotiate new leases on these terms with defaulting lessees (R. 232, 238–239). And, on June 14, 1940, after this suit was brought but prior to the trial, the Council incorporated the details of the committee's offer in a resolution to which was attached a proposed form of lease providing that

the lessee would subject the land to all liens existing upon the prior leasehold (R. 237–247).

Suit was brought on September 8, 1939, to cancel the lease and to recover possession of the lands occupied by Forness as tenant (R. 5–14).[2] After trial (R. 136–221), the district court dismissed the complaint (R. 345–347). The circuit court of appeals reversed and directed that judgment be entered for the United States upon the condition that the Council's offer to make a new lease be kept open for sixty days after entry of judgment (R. 412).[3]

ARGUMENT

1. The principal questions raised by the petition for certiorari present, in substance, the single issue of whether the case is governed by the New York Civil Practice Act. Sections 997–999

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[2] The Salamanca Trust Company, the mortgagee of the Forness property, was permitted to intervene and answer (R. 33–51), as were also the First National Bank of Salamanca, the City of Salamanca, the Salamanca Federal Savings and Loan Association, and the Home Owners' Loan Corporation, each of which claimed to have liens upon lands held under similar leases (R. 52–135).

[3] At the beginning of the trial (R. 137), the Government moved for summary judgment (see R. 222–283). The district court refused to consider the motion (R. 137). After the printed record and the Government's brief had been filed in the circuit court of appeals, the district court ordered that the affidavits in support of the motion be deleted from the record (R. 370–373; see also R. 374–380). The circuit court of appeals held that the district judge had no authority to strike these affidavits from the record (R. 389). Petitioners do not question this holding (see Pet. 20).

thereof provide in effect that payment of rent before judgment bars ejectment. In the courts below, petitioners contended that this statutory rule applied and that the complaint should be dismissed because they had made such a tender. They based the contention that the Civil Practice Act applied upon the provision of Section 8 of the Act of February 19, 1875, c. 90, 18 Stat. 330, 331, permitting the State of New York to extend its "municipal laws and regulations" over the City of Salamanca, and upon New York Laws, 1881, Chapter 188, extending "all the general laws of the State" over that city. They conceded that Chapter 188 was passed pursuant to the permission given the State by the 1875 Act and argued that the term "municipal laws and regulations" was synonymous with "general laws" and that therefore the federal statute permitted the State to extend the Civil Practice Act to actions on Seneca leases. The courts below rejected petitioners' contention, holding that the 1875 Act refers only to state laws regulating local government (R. 318–321, 389–391).

There is no substance to the contention (Pet. 12–13, 14–18) that the holding is erroneous. The arguments that the 1875 Act should be read as a whole (Pet. 14–15) and with regard to the terms of the leases which it ratified (Pet. 16–17) cast no light on the meaning of the phrase "municipal laws and regulations" nor do they indicate that the courts below misconstrued those words. That phrase, when it is used to describe a body

of laws of one of the states of the United States, must refer to the laws governing the cities, villages, and other municipal corporations of the state, and does not refer, as in international law, to all laws dealing with domestic matters (see opinion below at R. 390–391).

Petitioners now suggest that in chapter 188 New York asserted power to legislate for the Senecas without the consent of Congress, and conclude that the circuit court of appeals silently held chapter 188 to be repugnant to Article I, section 4, of the Constitution (Pet. 12–13, 15–16). But in the courts below, as we have pointed out, the petitioners conceded that chapter 188 was enacted pursuant to the Act of 1875 and had the same meaning, and they argued that, so far as concerned the present case, the question was of the meaning of the phrase "municipal laws and regulations" in the Act of 1875. This concession made it unnecessary for the circuit court of appeals to cite or discuss the state statute The concession, moreover, was proper. The general rule is that state law does not apply to the Indians except so far as the United States has consented. *Worcester* v. *Georgia*, 6 Pet. 515, 516. The New York Supreme Court had held just prior to the enactment of the statutes involved that New York did not have power, in the absence of federal consent, to regulate these leases. (See pp. 2–3, *supra*.) Chapter 188 makes reference to the Act

of 1875, thus showing that it was enacted pursuant to that statute. (See Appendix, p. 17.) In view of these facts, it was not to be supposed that New York sought by statute to regulate these Indian leases, even though it may have extended its laws over Salamanca and other villages to govern persons other than Indians.[4] Cf. *Matter of Patterson* v. *Seneca Nation*, 245 N. Y. 433; *Mulkins* v. *Snow*, 232 N. Y. 47, 51.

For like reasons, the state law is not applicable to the present controversy under the doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64. And, plainly, the lease cannot be supposed to have incorporated the laws of New York merely by preserving to the Indians as lessors the right to "resort to any legal remedy" to eject a defaulting lessee from the premises. Consequently, the court below was free to apply to the decision of the controversy the rule "which comports best with general notions of equity." See *Board of Commissioners* v. *United States*, 308 U. S. 343, 350.

2. Petitioners' remaining contentions present no question of importance. For example, there

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[4] Neither *State of New York* v. *Dibble*, 21 How. 366, nor *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, is to the contrary. The *Dibble* case sustained a New York statute punishing white men who trespassed on Indian lands. The *Kennedy* case held that the federal courts should not, by issuing writs of habeas corpus, interfere with pending proceedings in the state court involving the inheritance of Seneca property.

is nothing requiring review by this Court in their suggestion (Pet. 14, 20–21) that, if they had fully apprised the circuit court of appeals of the details of the new lease, it would not have reversed the judgment or at least would have required a modification in the terms of the proffered lease.[5] Equally without substance are the assertions (Pet. 18–20) that they were lulled into a continuing default and that it would be inequitable now to cancel the lease. As the court below said (R. 407):

> It would be both impractical and unfair to require the Indians to bring suit each year for the paltry sum owed on this plot, a suit costing more than the amount which it would yield, and it would be equally impractical and unfair to hold that they must expend part of the rent for badgering defendants and their neighbors into prompt payment. To hold that the Senecas cannot cancel this lease because they have treated defendants and others generously in the past would, in these circumstances, be a miscarriage of justice.

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[5] The provision of Section 3 of the Act of February 19, 1875, c. 90, 18 Stat. 330, granting the owner of improvements the right to a renewal, does not, of course, apply to Forness, whose lease was cancelled for eight years' default in rent payment. The statute grants that right only when the lease expires by lapse of time.

CONCLUSION

The decision below is correct and presents no conflict of decisions or question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1942.

APPENDIX A

Act of February 19, 1875, c. 90, 18 Stat. 330:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all leases of land within the Cattaraugus and Allegany reservations in the State of New York, heretofore made by or with the authority of the Seneca Nation of New York Indians, to railroad-corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws and form of government, lease lands within said reservations for railroad-purposes.

SEC. 2. That the President of the United States shall appoint three commissioners, whose duty it shall be, as soon as may be, to survey, locate, and establish proper boundaries and limits of the villages of Vandalia, Carrolton, Great Valley, Salamanca, West Salamanca, and Red House, within said Allegany reservation, including therein, as far as practicable, all lands now occupied by white settlers and such other lands as, in their opinion, may be reasonably required for the purposes of such villages; and they shall cause a return of their doings in writing, together with maps of such surveys and locations duly certified by them, to be filed in the office of the county clerk of the county of Cattaraugus, in said State, there to be recorded and preserved. The boundaries of said villages so surveyed, located, and established shall be the limits of said villages for all the purposes of this act.

SEC. 3. That all leases of land situate within the limits of said villages when

established as hereinbefore provided, except those provided for in the second section of this act, in which Indians or said Seneca Nation, or persons claiming under them are lessors, shall be valid and binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of said period, or at the expiration of such leases as terminate within that time, said nation through its councillors shall be entitled to the possession of the said lands, and shall have the power to lease the same: *Provided, however,* That at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding twelve years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in possession of such lands, on such conditions as may be agreed upon by him or them and such councillors; and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said councillors shall appoint one person, and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and the person or persons owning said improvements shall be entitled to a lease

of said land and to occupy and improve the same according to the terms of said award, he or they paying rent and otherwise complying with the said lease or said award; and whenever any lease shall expire after its renewal as aforesaid, it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided.

SEC. 4. That said Seneca Nation is hereby authorized, by resolution of its councillors, duly elected according to the laws and system of government of said nation, or in such other manner as said nation in council may determine, to lease lands within said villages to which, by the laws or customs of said nation, no individual Indian or Indians, or other person claiming under him or them, has or is entitled to the rightful possession.

SEC. 5. That it shall be the further duty of the said commissioners to cause all lands within such villages now leased, as hereinbefore mentioned, to be surveyed and defined as near as may be, and to cause the same to be designated upon the maps of such villages hereinbefore mentioned and provided for. All leases of lands within said villages, whether now existing or hereafter to be made under the provisions of this act, shall be recorded in the office of the clerk of said county of Cattaraugus in the same manner and with like effect as similar instruments relating to lands lying in said county outside of said reservations are recorded by the laws of said State of New York. All leases herein mentioned or provided for shall pass by assignment in writing, will, descent, or otherwise in the manner provided by the laws of said State:

Provided, however, That the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions.

SEC. 8. That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless,* That nothing in this section shall be construed to authorize the taxation of any

Indian, or the property of any Indian not a citizen of the United States.

Act of September 30, 1890, c. 1132, 26 Stat. 558:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the leases of land situate within the limits of the villages mentioned in the act of Congress entitled "An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases," approved February nineteenth, eighteen hundred and seventy-five, except leases to railroads, shall by the terms of said act be renewable, the same shall be renewable for a term not exceeding ninety-nine years, instead of the term of twelve years, as therein provided, subject to all other terms and conditions of said act.

Act of February 28, 1901, c. 622, 31 Stat. 819:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys which shall belong to the Seneca Nation of New York Indians arising from existing leases or leases that may hereafter be made of lands within the Cattaraugus, Allegany, and Oil Springs reservations, shall be paid to and be recoverable to the United States Indian agent for the New York Indian Agency for and in the name of the said Seneca Nation: *Provided,* That nothing herein contained shall be held to validate or confirm any lease that otherwise may be invalid.

SEC. 2. That from the moneys so received from said leases the said agent shall annually, on the first Wednesday after the

first Tuesday in June, pay over to the treasurer of the Seneca Nation the sum of two thousand five hundred dollars for the disposal by its council, and shall distribute the balance of said moneys, after deducting as hereinafter provided, among the heads of families of the Seneca Nation in like manner and under the same conditions that the annuities paid to the said nation by the United States are distributed.

SEC. 3. That the said agent shall give bond to the United States in such sum as may be approved by the Secretary of the Interior, and he shall make an annual report to the Commissioner of Indian Affairs of the receipt and disbursement of all moneys arising from said leases, and he shall receive annually, as additional compensation, the sum of two hundred and fifty dollars.

SEC. 4. That the treasurer of the Seneca Nation shall annually, on the last Tuesday in April, make a written report to the United States Indian agent of the New York Indian Agency of all moneys received and disbursed by him as treasurer of said Seneca Nation.

SEC. 5. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.

Laws of New York, 1881, c. 188:

An Act extending the general laws of the State of New York over lands included in the villages surveyed, located and established on the Allegany Indian Reservation, by United States Commissioners appointed for that purpose, constituting the estate therein when held under lease from the Seneca Nation of Indians, a freehold estate; ratifying and confirming the acts

of town, village and school officers concerning such lands and the residents thereof.

Passed May 2, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All those parts of the Allegany Indian Reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed, located and established by John Manley, Joseph Scattergood, and Henry Shanklin, commissioners appointed by the president of the United States for that purpose pursuant to an act of congress approved February nineteenth, eighteen hundred and seventy-five, are constituted parts of the several towns within which they are located, and all the general laws of this state are extended over and shall apply to the same. Provided always, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

§ 2. All acts of commissioners of highways or other town officers of the towns in which said villages are located, concerning the lands or roads therein, all proceedings incorporating villages on said lands, or of the officers of such villages concerning the same, or under such acts of incorporation; all proceedings forming school districts within such villages, and all acts or proceedings of school officers in such districts heretofore done or performed which would have been legal if such villages or the land

included therein had not constituted a part of said reservation, are hereby ratified, legalized and confirmed.

§ 3. Land situate in said villages, held by or under lease from the Seneca Nation of Indians and which the holders are entitled to have renewed at the expiration thereof by virtue of said act of congress are and shall be for all purposes considered a freehold estate and the owners of such leases freeholders, and the right of dower and tenant by curtesy shall attach thereto, and shall upon the death of any person owning the same without having devised it, descend in the same manner as a freehold of inheritance and shall for that purpose be treated as real estate. Provided, however, that the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

APPENDIX B

House Misc. Doc. No. 75, 43d Cong., 2d sess. (1875) reads as follows:

> On motion of Mr. Scudder:
>
> Whereas the legislature of the State of New York has, at different times, ratified and confirmed leases between Indian and white settlers on the Allegany Indian reservation in said State; and,
>
> Whereas the courts of this State have decided that said ratification is null and void, the Congress of the United States alone possessing power to deal with and for the Indians, and that as Judge Barker, of the supreme court of this State, in an elaborate opinion, given in a suit to test the legality of such ratification of leases, did say that State action alone cannot accomplish the results; that the State should, through its legislature and executive officers, take appropriate steps to secure the aid and cooperation of the United States to secure to the white settlers the ratification of their leases, and to protect them in their rights: Now, therefore,
>
> *Resolved* (*if the senate concur,*) That our Senators and Representatives in Congress are requested to lay the matter before Congress at an early day, and procure the passage of a law, or take some action for the relief of said white settlers.
>
> *Resolved* (*if the senate concur,*) That a copy of this resolution be furnished to each

of the members of the Senate and Congress from this State.

By order: HIRAM CALKINS, *Clerk.*

IN SENATE, *February 2, 1875.*

Concurred in without amendment.

By order:

H. A. GLIDDEN, *Clerk.*

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